

~~EX PARTE COMMENTS~~

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July 2, 1998

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: Comments on *Ex Parte* Comments
MM Docket No. 97-217**

Dear Ms. Salas

Transmitted herewith, on behalf of The National ITFS Association, are the original and five (5) copies of its Comments in the above-referenced matter.

Should you have any questions with respect to this filing, please contact the undersigned.

Very truly yours


Wayne Coy, Jr.

Enclosures

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List A B C D E

BEFORE THE

Federal Communications Commission

In the Matter of

Amendment of Parts 1, 21, and 74 to Enable
 Multipoint Distribution Service and
 Instructional Television Fixed Service
 Licensees to Engage in Fixed Two-Way
 Transmissions

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MM Docket No. 97-217

File No. RM-9060

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

Comments on Ex-Parte Presentations

The National ITFS Association ("NIA"), representing 74 educators in 29 states plus the District of Columbia who are licensees or permittees of ITFS facilities, and who has been an active participant in all stages of this proceeding to date, through its attorney, files these comments on the *Ex Parte* filings of others in this matter. Because the time period for filing these Comments was so short and the need to gather the necessary decision makers together so difficult, the Comments will be brief and to the point. NIA wishes to place special emphasis on four critical area of the Rule Making: Interference Issues, Protected Service Areas for ITFS licensees, FCC Supervision of Retuning, and Renewal Expectancy. This should not be taken as an indication of the abandonment of any other positions taken in the docket or a diminution of the NIA interest in any of the other issues its has previously raised, but merely a restricted response to more narrowly drawn issues raised in the *Ex Parte* presentations to date. In fact, a copy of the

Joint Statement signed by representatives of the Wireless Cable Industry and NIA is attached to underscore our concern for a wider range of issues in the proceeding.

Interference Issues

This is our overriding concern. NIA spent nearly a year negotiating with WCA on policy issues arising out of the transition to the digital and two-way worlds. The Joint Statement referred to above resulted. However, it should be noted that all of those negotiations, and the joint statement itself, were based on the assumption that the “engineering” was sound and that the various uses could be made to work with and around each other without interference. In substantial pleadings filed earlier in this proceeding and in additional *ex parte* filings, The Catholic Television Network, among others, has raised significant issues involving those same engineering issues. We have not been able to examine positions taken by either CTN or WCA and take no stand one way or the other on the engineering, but we feel strongly that these issues deserve serious attention. In a world of all downstream, all video, we could make judgments and could understand risks. We don’t have the staff engineering support to evaluate the world of up and down stream, of simultaneous and two-way data and video, of brute force interference, of the need for buffer channels, and of the impact of the creation of super- and sub-channels.

For all of the abovereasons, we urge caution. Thousands, if not tens of thousands of students in hundreds of classrooms are counting on getting credit for courses now being offered and scheduled for future offering over ITFS channels. More importantly, our post-secondary licensee institutions are collecting tuition based on ITFS-delivery of for-credit courses. Satellite campuses are being opened to enable to serve the outlying areas of our institutional licensee’s areas based in substantial part on ITFS delivery of instructional programming. It is the unknown

that frightens us. Virtually all educators are looking forward to the development of two-way communication as a way to further expand and improve our services, and so we have eagerly sought to be flexible about the introduction of this new capability. But until we can be certain that we are not going to lose or impair what we have already been able to achieve, we urge caution in the adoption of a radical new delivery system in a radically new environment. In order not to delay the process unduly by seeking exhaustive field testing and experimentation of the digital two-way equipment prior to licensing, we urge the adoption of a flexible approach, which could be implemented by adoption of a rule that requires a party creating harmful interference to correct the interference immediately or cease operation of the interference-causing equipment. We wish the wireless industry “godspeed” in the effective deployment of its new activity, but we need a way to make mid-course adjustments if it doesn’t work as predicted and our services are lost or impaired as a result. We need the new environment to preserve a world free from harmful interference so that we can continue to serve the students who are counting on our instructional materials to meet their scholastic needs.

Specifically we urge the Commission to adopt rules that enable any of the parties that find that the new environment does not perform as expected to be able to have an opportunity to demonstrate that the actual *versus* the predicted service is creating a deficiency which needs immediate attention and get and the FCC to respond appropriately with corrective field action and adjustments without waiting for a license to expire.

PSA

At an earlier stage of the proceeding, the Petitioner indicated that it did not have an objection to ITFS licensees, who did not have excess capacity leases, asking for and enjoying the

benefit of the same protected service area of an MDS or MMDS operator or lessee. We now reiterate our desire and need for PSA protection, flexibility, and capability, as an addition to our present receive-site registration, especially in light of the uncertainty of the interference environment (see above). When the Protected Service Area extended only 15 miles and many school licensees had receive sites located beyond that limit, and when ITFS licensees in other communities were the primary, if not sole, source of interference, it was an easy call to rely on the registration process. Now, in the very different circumstances that are predicted to prevail in the very near future after the adoption of the instant Order, we see the need for a more comprehensive protection provided by the PSA approach, but wish to add it to, not replace, the old registration system which still protects the occasional far outpost and any installation over thirty feet above ground.

FCC Coordination of Retuning

“Retuning” in this context means permanent relicensing not merely channel mapping or loading. Either Section 74.902 or Section 74.986 must be expanded to include FCC supervision of requests or demands for changes that are required for the introduction of advanced technology. The equivalent MDS Rule should also be changed to allow for retuning of those channels under equivalent circumstances. These changes must specifically allow ITFS operators to apply for MDS as well as traditional ITFS frequencies.

Any party wishing to have another party retune from one set of frequencies to a new set of frequencies must begin the process by presenting the party to be moved with a quantitative interference study and an analysis of the reasons why the move is necessary to facilitate the introduction of new technology. The interference study and all other materials should take into

account the present **and future** potential uses to for all of the spectrum reserved for ITFS purposes. This presentation would then signal the start of a ninety day period during which the party to be moved and the moving party negotiate the details of the proposed move. If the parties fail to agree on a plan of action on a voluntary basis, the moving party may, subject to the provisions of the new 74.902 or 74.986, file an application for the proposed move at the FCC. The party to be moved then would have 60 days in which to register its objections on whatever grounds it wishes, including but not limited to interference issues, coverage issues, power and field strength issues, future use issues, and disruption issues. Hopefully the parties would continue to seek a voluntary meeting of the minds, with the FCC deciding the matter only if that process is not successful.

Renewal and Renewal Expectancy

Any voluntary or involuntary retuning shall not adversely affect in any way the renewal expectancy of any ITFS or MMDS licensee.

Summary

NIA recognizes the urgency to adopt rules and to move on with the implementation of them, but urges the Commission, especially where there is no hard factual data or evidence beyond prediction, to be cautious and provide a safety valve to redress serious miscalculations. Secondly, the FCC should provide PSA protection to all parties using the 2500 MHz spectrum, but retain individual site registration for ITFS receive sites not covered by the PSA protection. Thirdly, while all parties are willing to consider retuning as a way to facilitate the introduction of new technologies, the ITFS parties seek procedural protections and full consideration of future

needs in any involuntary retuning. Finally, NIA seeks the protection of renewal expectancy to cover their willingness to be flexible.

Respectfully submitted

National ITFS Association

By: 

Its Attorney

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July 2, 1998

JOINT STATEMENT OF POSITION

For over a year, representatives of the National ITFS Association, Inc. ("NIA") and the Wireless Cable Association International, Inc. ("WCA") have been meeting in an effort to come to agreement on issues of mutual interest deriving from the emerging use of digital technology on Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") channels. The underlying goal of these negotiations has been to craft a regulatory environment that assures that the educational community reasonably shares in the benefits that digital technology will permit, while permitting the wireless cable industry to become a viable competitive force in the marketplace (which benefits both the wireless cable industry and the ITFS community). After significant compromise by each side, NIA and WCA have come to agreement that the public interest will best be served by incorporation of the following concepts into the rules and policies of the Federal Communications Commission. Moreover, NIA and WCA have agreed to create a standing working group to address current and future issues of concern. Because the following concepts reflect a series of compromises between the parties on matters that are inextricably intertwined, NIA and WCA jointly urge the Commission to adopt them en toto without change.

- I. In order to assure the substantial educational use of the ITFS spectrum, each ITFS licensee shall, at a minimum, have the right to use 25% of capacity of its channels. In any digitized system the ITFS licensee shall be required to deliver no less instructional material than is currently required for analog ITFS systems under Section 74.931(e) of the Commission's Rules.
- II. In order to assure the immediate availability of capacity for immediate ITFS usage, each ITFS licensee leasing capacity for digital usage shall refrain from leasing an amount equal to no less than 5% of the capacity of its channels.
- III. Each ITFS licensee that leases excess capacity for digital services must maintain the ability to recapture for the transmission of ITFS programming at least an additional 20 % of the capacity of the channels it leases. The lowest permissible annual rate of recapture shall be 5% of the capacity of its ITFS channels, with a maximum one year advance notice per instance of recapture. The right to recapture may be deferred during the first five years of any excess capacity lease agreement upon agreement of the parties. The parties may agree to an economic adjustment of the ITFS licensee's consideration under the agreement upon recapture, provided that any economic detriment shall not be disproportionate to the amount of capacity recaptured and shall

not include any "Baseline Consideration." "Baseline Consideration" shall be defined to include: (1) any transmitters, transmit antenna, combiners and waveguide necessary to operate the station ("Station Equipment"), (2) any transmit site lease costs necessary to house the Station Equipment; and (3) the utility and maintenance costs necessary to maintain and operate the Station Equipment.

- IV. All ITFS licensees should be permitted to "channel load" any or all of their capacity onto any ITFS channel within the same multi-licensee system. Such "channel loading" shall not be considered negatively at the time the ITFS licensee seeks renewal of its authorization.
- V. Any ITFS licensee should be permitted to "swap" channels with any other ITFS or MDS licensee in the 2.5 GHz band operating in the same geographic area. Particularly in order to promote the introduction of advanced technologies, applications for Commission approval of such swaps should be given expedited consideration by the Commission.
- VI. In recognition of the difficulties that may be faced in converting spectrum used for return paths to downstream uses, each ITFS licensee that leases channels to be employed for return paths shall be required to maintain at least 25% of its licensed channels to be used for downstream transmissions during the term of the lease and following termination of its leasing arrangement.
- VII. ITFS licensees should be permitted to enter into excess capacity leases of up to fifteen years duration, provided that any lease extending beyond the term of a licensee's authorization provides for termination of the lease in the event the Commission denies an application for renewal.
- VIII. Excess capacity lease agreements that provide for digital usage and were entered into prior to the release of an order adopting these concepts shall be grandfathered for their duration.
- IX. ITFS licensees should have opportunities equal to those afforded MDS licensees to implement advanced technologies utilizing their spectrum.
- X. Authorizations for return paths and boosters on ITFS channels should be issued in the name of the ITFS licensee of that channel.